SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted]

No. [redacted] 92

WILLIAM M. MITCHELL, ADMINISTRATOR OF THE ESTATE OF [redacted],

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, [redacted]

PETITION FOR WRIT OF [redacted] TO THE UNITED STATES [redacted] FOR THE [redacted] SUPPORT [redacted]

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.

WILLIAM M. MITCHELL, ADMINISTRATOR OF THE ESTATE OF KIT C. KOGER,

PETITIONER, AND APPELLEE BELOW

v.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY,

RESPONDENT, AND APPELLANT BELOW

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved

This is a civil action that originally was instituted in the Circuit Court of Henry County, Virginia, by William M. Mitchell, Administrator of the Estate of Kit C. Koger,

hereinafter called the "plaintiff", against New England Mutual Life Insurance Company, hereinafter called the "defendant", and removed by said defendant to the federal court upon the ground of diversity of citizenship. (R. 1).

A final order was entered in the District Court for the Western District of Virginia, by which order a judgment was entered in favor of the plaintiff on the pleadings for the face amounts of two life insurance policies. From this judgment an appeal was taken by the defendant to the United States Circuit Court of Appeals for the Fourth Circuit, which reversed the judgment appealed from. (R. 11).

The petitioner alleged in the pleadings that on July 13, 1938, the defendant issued to the petitioner's decedent two life insurance policies, one in the face amount of $5,000.00 and the other in the face amount of $10,000.00; that the two policies were identically worded except as to the amounts payable and premiums thereon; that the necessary premiums were paid on said policies; that the insured died from accidental causes on August 30, 1939; and that due and sufficient proof of such death was made to the defendant. (R. 4).

After the case had been removed to the District Court, the defendant filed its answer and asserted that the insured committed suicide by shooting himself through the chest with a shotgun and that suicide more than one year and less than two years after the issuance of the policies constituted complete defense due to accident. (R. 7).

The plaintiff moved the court for a judgment on the pleadings to the extent of $15,000.00 the face value of the life insurance contracts on the following grounds:

(1) The defendant's suicide clause was not a limitation of liability or exclusion of death by suicide from the coverage of the policy but on the contrary provided for a forfeiture and hence it did not comply with Section 4228 of the Code of Virginia, and

(2) The suicide clause in defendant's policies is inconsistent and irreconcilable with defendant's incontestable

clause and such conflict should be resolved against the defendant so as to preclude it from asserting the defense of suicide. (R. 10).

The defendant contended that its suicide clause did comply with the provisions of Section 4228 of the Virginia Code in that it constituted a limitation of liability rather than a forfeiture and as it was a limitation of liability it did not conflict with and was not affected by the incontestable clause.

The suicide and incontestable clauses as they appear in the policies provide as follows:

> "If the Insured, whether sane or insane, shall die by his or her own hand or act within two years from the date thereof, this Policy shall be void and shall have no value; but in such event the Company will return any premiums paid.
>
> "This Policy shall be incontestable after it has been in force for a period of one year from its date of issue, except for failure to pay premiums, and except as to any provision contained in any supplemental agreement annexed hereto relating to additional benefits specifically granted in event of total and permanent disability or of death by accident." (R. 11).

The applicable Virginia Statute which is Section 4228 of the Code of Virginia as amended provided as follows:

> "DEFENSES OF SUICIDE AND DEATH BY LEGAL EXECUTION IN ACTIONS ON LIFE INSURANCE POLICIES: WHEN POLICIES INCONTESTABLE: EXCEPTIONS.—In any action, motion or other proceeding on a policy of life insurance hereafter issued to any person residing in this State at the time of issuance thereof, or which is otherwise subject to the laws of this State, to recover for the death of such person, it shall be no defense that the insured committed suicide, or was put to death by execution under

the law; provided, however, that if there shall be an express provision in the body of such policy limiting the liability of the insurer in the event that the insured shall, within two years from the date thereof, die by his own act (whether sane or insane), such provision shall be valid but the insurer shall be obligated to return, or pay, at the least, the amount of the premiums paid on account of such policy. Nor shall such policy be contestable for any cause after it shall have been in force during the lifetime of the insured for one year from its date, except for nonpayment of premiums and except to violation of the conditions of such policy requiring the payment of additional premium in the event of naval or military service in time of war; provided, however, that in the event of a misstatement of age, the amount to be paid by the insurer shall be the amount of insurance which the premium paid would have purchased at the true age of the insured. (1916, p. 168; 1926, p. 372; 1932, p. 458)"

The question involved in this case is as follows:

Under the law of Virginia, is the defense of suicide available to an insurance company in an action brought by insured's administrator on a policy of life insurance which has been in effect more than one year and which contains the suicide and incontestable clauses as set out above?

II

Reasons Relied on for Allowance of the Writ

1. The decision of said Circuit Court of Appeals is a decision involving an important question of Virginia law and decided in a way probably in conflict with applicable Virginia law as determined by the highest appellate court of that state in that the holding of the Circuit Court of Appeals to the effect that the present litigation does not involve a question of a contest of the policies here in question but on the other hand involves a question of limited liability or exclusion of risk is in conflict with the decision of the Supreme Court of Appeals of Virginia as determined in *United Security Life Insurance & Trust Com-*

pany v. *Massey*, (1932, 1933) 159 Va. 832, 164, S. E. 529, 167 S. E. 248, 85 A. L. R. 306.

2. The decision of said Circuit Court of Appeals is in any event in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Badger* v. *Hoidale*, (C. C. A. 8th) 88 Fed. (2d) 208, 109 A. L. R. 798, in that even if it be held that *United Security Life Insurance & Trust Company* v. *Massey*, supra, "is not a precise adjudication of the question here involved", nevertheless it must be conceded that the applicable language of the Massey case is certainly considered dictum, yet it has been ignored in the decision of the pending case notwithstanding a contra holding in *Badger* v. *Hoidale*, supra.

3. The decision of the said Circuit Court of Appeals is a decision of a Federal question probably in conflict with an applicable decision of the Supreme Court of the United States in that if it be conceded that *United Security Life Insurance & Trust Company* v. *Massey*, supra, is not an exact decision of the question here involved, nevertheless that opinion insofar as it is here material must be regarded as considered dicta and the opinion and the decision of the said Circuit Court of Appeals does not give deference to that opinion and is, therefore, in direct conflict with the holding of the Supreme Court of the United States in *Hawks* v. *Hamill* (1933) 288 U. S. 52, 53 S. C. R. 240, 77 L. Ed. 610.

4. The decision of said Circuit Court of Appeals is a decision of another Federal question probably in conflict with applicable decisions of the Supreme Court of the United States in that said Circuit Court of Appeals has utterly ignored and refused to follow the holding of said Supreme Court in *West* v. *American Telephone & Telegraph Company* (1940) U. S. , S. C. R. , 85 L. Ed. (Advanced Opinions) 146, to the effect that "it is the duty of" a Federal court in cases where jurisdiction rests exclusively on diversity of citizenship "to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule however superior it may appear from the viewpoint of general law".

5. If we have misapprehended the effect of *Hawks* v. *Hamill*, supra, and *West* v. *American Telephone & Telegraph Company*, supra, then we say that the decision of the said Circuit Court of Appeals in holding that it is not bound by *United Security Life Insurance & Trust Company* v. *Massey*, supra, involves an important question of Federal law, to-wit: The extent to which a Federal court sitting in diversity of citizenship cases is bound by considered dicta of the local courts and to what extent such Federal court may rely upon such considered dicta as available data for the purpose of determining the local law which question if not already decided by the Supreme Court of the United States should be settled by said Supreme Court.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals had in the case numbered and entitled on its docket "No. 4739, New England Mutual Life Insurance Company, Appellant, v. William M. Mitchell, Administrator of the Estate of Kit C. Koger, Appellee," to the end that this cause may be reviewed and determined by this court as provided for by the statues of the United States; and that the judgment herein of said United States Circuit Court of Appeals be reversed by the Court and for such further relief as to this Court may seem proper.

Dated May 14, 1941.

WILLIAM M. MITCHELL,
ADMINISTRATOR OF KIT C. KOGER, *dec'd.*,

BY W. R. BROADDUS, JR.
Martinsville, Virginia

WILLIAM M. MITCHELL
Bassett, Virginia

JOHN W. CARTER, JR.
Danville, Virginia
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.

WILLIAM M. MITCHELL, ADMINISTRATOR
OF THE ESTATE OF KIT C. KOGER,
PETITIONER, AND APPELLEE BELOW

v.

NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY, RESPONDENT, AND APPELLANT BELOW

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Opinions of Courts Below

The opinion in the United States Circuit Court of Appeals is reported in 118 Federal (2d) 414. The opinion of the United States District Court for the Western District of Virginia is reported in Fed. Sup. .

II.

Jurisdiction.

1. The date of the judgment to be reviewed is the 10th day of March, 1941, as appears from page 24 of the record.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Title 28, U. S. C. A., Section 347.

3. The cases believed to sustain said jurisdiction are as follows:

Magnum Import Co. v. *Coty*, 262 U. S. 159;

Southern Power Co. v. *North Carolina Public Service Co.*, 263 U. S. 508;

Keller v. *Adams-Campbell Co.*, 264 U. S. 314;

Layne & Bowler Corp. v. *Western Well Works*, 261 U. S. 387;

Webster Electric Co. v. *Splitdorf Electric Co.*, 264 U. S. 463.

III.

Statement of the Case.

The case has already been stated in the preceding petition filed herewith and this statement is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The United States Circuit Court of Appeals erred in holding that suicide of respondent's intestate within two years after issue of the life insurance policies in question but more than one year after issue of said policies is available to the respondent as a defense to an action on said policies.

V.

ARGUMENT.

Summary of the Argument.

Point A.—It is the settled law of Virginia (in which state this action arose) that the suicide of the insured more than

one year after the date of the issue of a policy of life insurance is not a defense to an action on a policy such as is here in question because the language of the policies does not limit liability or exclude the risk of suicide, but works a forfeiture for the breach of a condition subsequent, and, therefore, is a contest within the meaning of Section 4228 of the Code of Virginia. For this reason suicide is not available to the insurer as a defense to this action. United Security Life Insurance and Trust Company v. Massey, (1932, 1933) 159 Va. 832, 164 S. E. 529, 167 S. E. 248, 85 A. L. R. 306.

Point B.—The decision of the Circuit Court of Appeals in this case is in conflict with a decision of the Circuit Court of Appeals for the Eighth Circuit in Badger v. Hoidale, (C. C. A. 8; 1937) 88 Fed. (2d) 208, 109 A. L. R. 798, in that in the present case considered dictum of the Supreme Court of Appeals of Virginia was ignored by the Circuit Court of Appeals for the Fourth Circuit when it was attempting to construe or ascertain the meaning of the law of Virginia.

Point C.—The decision of the Circuit Court of Appeals in the present case is in conflict with the decision of the Supreme Court of the United States in Hawks v. Hamill, (1933) 288 U. S. 52, 53 S. C. R. 240, 77 L. Ed. 610, in that the Circuit Court of Appeals for the Fourth Circuit has in the present case refused to give deference to the decision of the Supreme Court of Appeals of Virginia in United Security Life Insurance and Trust Company v. Massey, supra, which at least amounts to "considered dictum and not comment merely obiter".

Point D.—The decision of the Circuit Court of Appeals in the present case ignores and refuses to follow the mandate of the Supreme Court of the United States in West v. American Telephone & Telegraph Company (1940) U. S. , 61 S. C. R. 179, 85 L. Ed. (Adv. Opinions) 147, to the effect, "that it is the duty of" a Federal court in cases where jurisdiction rests exclusively on diversity of citizen-

ship "to ascertain from all available data what the state law is and apply it rather than to prescribe a different rule however superior it may appear from the viewpoint of general law".

Point E.—In any event it is desirable that the Supreme Court of the United States shall determine (if it has not already determined) the extent to which a Federal court in determining questions of local law is bound by considered dicta of local courts and to what extent such Federal courts may rely upon such considered dicta as available data for the purpose of determining local law.

POINT A.

Under the law of Virginia suicide is not available to the insurer as a defense to this action.

The question of law involved under this point was squarely presented by the pleadings in this case and the District Court in which this cause originated decided that question squarely in accordance with our contention. In other words, the trial court held in a well considered opinion that under the law of Virginia the defense of suicide is not available to an insurance company in an action brought by insured's administrator on a policy of life insurance which has been in effect for more than one year prior to the alleged suicide and which contains the suicide and incontestable clauses set out in the summary statement of the matter involved in this case which is included in the petition for the writ of certiorari. (R. 13). Section 4228 of the Code of Virginia which is the applicable statute has also been set out in full in our petition. (R. 14).

The trial court aptly summarizes its view of the legal question involved in the following language:

> "The statute, Section 4228, begins by declaring that in this State suicide shall constitute no defense to a life insurance policy, with the proviso that an insurance company may to some extent protect itself from this

enactment by ' . . . an express provision in the body of such policy limiting the liability of the insurer . . . ' The express provision of the policy here in a suit, in terms, is not a limitation of liability, but a forfeiture of all rights under the policy coupled with a provision for the return of premiums. It is a well established rule in Virginia that in actions on insurance policies, the insured should be protected by every proper presumption, it being the policy of the courts to uphold such contracts when it can be in good conscience done. *Flannagan* v. *Mutual Insurance Co.*, 152 Va. 38, 73. Therefore, it seems to me that there is no burden upon the policyholder's estate to show that the express provision in the policy is less favorable to him than the express provision authorized by statute. *In order to bring itself within the proviso of the statute, it was incumbent upon the insurance company to comply with the terms therein imposed; and as in this instance the insurance company failed so to do,* I am of the opinion that the suicide clause in defendant's policy must fail because it does not comply with the provisions of Section 4228, and therefore suicide is no defense to this action because of the other provisions of Section 4228 and the incontestable clause in the policy." (R. 19)

Is not this reasoning sound? The General Assembly of Virginia lays down a general rule that in an action on a life insurance policy "it shall be no defense that the insured committed suicide." It then provides that the insurer has a means of escape from this general rule (for a limited time) if it will write "*an express provision* in the body of such policy *limiting the liability of the insurer*". Is it asking too much of the insurer to insist that if it does not wish to be bound by the general rule, then it is incumbent upon it to comply with the plain terms of the statute in order to bring itself within the exception? If it does not choose to follow the language of the statute, then by a cardinal rule of construction of insurance contracts, the language which it does use if susceptible of two constructions, should be construed against the insurer. *Ayers* v. *Harleysville Mutual Cas. Co.* (1939) 172 Va. 383, 2 S. E. (2) 303.

The Circuit Court of Appeals reversed the Trial Court because in its opinion the provision of the policy to the effect that it should "be void and shall have no value" in the case of suicide has the same effect as "a provision that suicide is not a risk covered by the policy or that liability under the policy shall not extend to suicide". (R. 26).

The Doctrine of United Security Life Insurance and Trust Company V. Massey

Which of these two conflicting decisions is correct depends upon the proper interpretation of *United Security Life Insurance and Trust Company* v. *Massey*, (1932, 1933) 159 Va. 832, 164 S. E. 529, 167 S. E. 248, 85 A. L. R. 306. It is our contention that the District Court correctly construed the Massey case and the Circuit Court of Appeals ignored it. We make three contentions with respect to the Massey case as follows:

(a) The language and conclusions of the court with respect to the defense of suicide to an action on a life insurance policy are not dicta.

(b) Even if such language and conclusions may be called dicta they are considered dicta and entitled to the respect of Federal courts sitting in diversity of citizenship cases.

(c) Such language and conclusions at least constitute "available data as to what is the law of Virginia" and, therefore, "it is the duty of the Federal courts" to accept it and apply it though some other rule may appear to such Federal courts to be superior thereto.

What is the Decision in the Massey Case?

In *United Security Life Insurance Co.* v. *Massey*, supra, the facts are thus stated in the opinion:

> "On the 24th day of October, 1927, Charles O. Proctor made application to the United Security Life

Insurance and Trust Company of Pennsylvania, appellant, for a fifteen year endowment life insurance contract, and on the 10th day of November, 1927, pursuant thereto, the company entered into an insurance contract with him, which was, in form, rather unusual and unique. It was, however, its accustomed method of business with its insured. The face value of the policy or contract was $5,000.00, which amount was at once advanced to Proctor, and which he was to repay to the company in monthly payment of $51.75 for fifteen years, if he should live that long, otherwise, only so long as he lived. To secure the monthly payments Proctor executed a bond in the penalty of $10,000.00 and a deed of trust on his real estate in the city of Newport News. The contract of insurance provided that if Proctor died within the fifteen year period, its terms having been kept and performed by him, the company would release the deed of trust and return the bond to the wife of the assured, or anyone claiming under or through them.

"In the application for the insurance Proctor stated that he was, at the time, a lawyer and that previously he was a conductor for the Chesapeake and Ohio Railway Company. Embodied in the application was the warrant and agreement, among other things, that if he should, at any time, die 'in service on any railway train', without the written consent of the insurance company so to be engaged, any agreement under the application should thereupon become null and void, and that the application should be the basis of the contract and regarded as a part thereof, if and when the same was put into force." (159 Va. 836, 837)

The application for the policy contains the following language: "I hereby warrant and agree, that . . . if, within two years from the date of the agreement, I shall die by my own hand or act, whether sane or insane, or at any time shall die . . . in service on any railway train . . . any agreement under this application shall thereupon

become null and void, and that the statements and answers to the printed questions above, together with this declaration, . . . are full, complete and true, that they shall constitute the application, and be made the basis of this contract and shall be regarded as a part of the contract." (159 Va. 837, 838).

The policy itself carried the following provisions: "That during the aforesaid term of years (the life of the policy) the said party of the first part (the insured) shall not, without the written consent of the said party of the second part (the insurer) . . . be personally engaged . . . in service on any railway train." (159 Va. 838, 839). There was a further policy provision "That in case any of the statements or declarations made in the above-mentioned application are untrue; or in case of the violation by the said party of the first part of any of the above covenants, promises and agreements on . . . part to be kept and performed; or in case of the death of the said party of the first part by his own hand or act, whether sane or insane, within two years from the date hereof . . . then the above-mentioned bond shall at once at the option of the party of the second part, become due and payable, etc." (159 Va. 839)

The Court continues its statement of facts as follows:

> "Charles A. Proctor was killed on the 29th of March, 1929, by being accidentally run over by a Chesapeake and Ohio Railway train, on the railroad yards in the city of Newport News, Virginia, while he was acting as a conductor or brakeman on the train being operated on the yards.
>
> "Ruby O. Proctor, widow of the deceased, and one of the appellees, demanded the return of the bond and the cancellation or release of the deed of trust which was refused by the appellant, the insurance company, because the assured had allegedly broken his covenant not to become engaged in railway service and had met his death while engaged in an excepted occupation.

"In November, 1929, the appellant instituted a chancery suit against the administrators and heirs at law of the assured for cancellation of the insurance agreement, in which the defenses already referred to were asserted. The defendants, appellees here, filed answers to the original and amended bills and interposed demurrers thereto, and the case was heard upon the issues joined and the court sustained the demurrers and dismissed the bills. Upon this action of the trial court the case is before us." (159 Va. 839)

The opinion then states the issue and respective contention in this manner:

"It is conceded that the sole issue on this appeal and therefore the single question for our determination is the construction of Section 4228 of the Code of Virginia, in its relation, if any, to the case.

"The insurance company, appellant, contends that the action taken by it is not a contest of the policy but is really an insistence upon its terms; that the action of the trial court amounted to an abrogation of the express provisions of the contract of insurance because the death of the assured was occasioned by a hazard or risk which was not covered by the policy but which was explicitly excepted therefrom.

"It is the contention of the appellees that the statute is applicable to this case and that its terms preclude the right of the insurance company to invoke the provisions of the policy in its behalf, for any cause, after the death of the assured, save for such cause or causes as are embraced in the exceptions stated in the statute." (159 Va. 840)

In the course of its opinion by Mr. Justice Browning handed down on June 16, 1932, the Court says:

"(2) In the case in judgment the insurer and the insured, undoubtedly, had the right to contract as they

did, in the absence of any statutory provision to the contrary, provided their obligations were consistent with public policy. With these inhabitions the insurance company had the right to limit its liability. The terms of the policy amounted in plain and unambiguous terms to those contemplating the protection of insurance that the issuing company would not assume the risks incident to the hazardous occupation of service on railroad trains." (159 Va. 842-843)

There are then discussed or cited every case cited by the respondent (in its brief in the Circuit Court of Appeals) except *Moore* v. *Bankers Credit Life Insurance Company*, (1931) 223 Ala. 373, 136 So. 798. After reviewing these cases the opinion says:

"(4) It is said by some of the text-writers and annotators that there is a conflict of authority upon the principles enunciated in the cases cited, and this is true, but we think that the weight of reason, right and logic is with the contention that there is no inconsistency between the Virginia incontestable statutory provision and the excepted risk provision in the policy in the case in judgment. The incontestable provision 'is not a mandate as to coverage, a definition of the hazards to be borne by the insurer'.

"The policy in question limited its coverage by excepting from its operation and effect the assured, if he should engage in service on a railroad train. The engagement in such service *ipso facto* put him outside the folds of its protection.

"Charles A. Proctor violated his warranty by engaging in such service and thereby lost his life. He was a voluntary stipulator to refrain from doing that which would at once deprive him of insurance security, in the absence of something done or left undone by the company which would parry this effect. As to this latter we cannot say on the issue developed by the demurrer.

"The hazards of railway service were never assumed by the company because they were expressly excepted." (159 Va. 848)

Finally the Court's holding is as follows:

"We hold that the action taken by the appellant is not a contest of the policy, in the meaning of the statute; that the risk taken by Charles A. Proctor, in engaging in the railroad service which resulted in his death, was without the coverage of the policy, that the company did not insure his life against such hazard; and that the trial court erred in sustaining the demurrer.

"(9) It is perfectly plain that an insurance company is not liable for a loss not covered by its policy. To use an extreme illustration, if one were to die after the expiration of a term policy there would be no liability, and a company which undertook to defeat an attempt to saddle upon it a loss would not be contesting it. To use another illustration, if it were to declare that death due to an accident in an airplane was not covered, there could be no liability for such a loss, and a denial of liability would not constitute a contest. But it is also plain that if liability were denied because of some condition subsequent broken, that would be a contest within the purview of Code, section 4228, as amended by Acts 1926, c. 205. *Whitfield* v. *Aetna Life Ins. Co.*, 205 U. S. 489, 501, 27 S. Ct. 578, 51 L. Ed. 895, 898." (159 Va. 849, 850).

It will be observed that the contention of the company was precisely that of the respondent here, to-wit, that the "action taken by it is not a contest of the policy but is really an insistence upon its terms . . . because the death of the assured was occasioned by a hazard or risk which was not covered by the policy but which was explicitly excepted therefrom."

It will be observed that the Court had to construe Section 4228 of the Code of Virginia, which is the same section we

rely upon. There is this distinction: It did not have to consider whether the company had complied with the statute so as to avoid the general declaration of policy by limiting the company's liability in the event of suicide. Section 4228 insofar as it is material was with one exception in the same language as it now appears. In 1932 the General Assembly extended the time within which the company might limit its liability as to suicide from one year to two years.

It will be observed that the warranty against suicide and against service on any railway train appear in the same paragraph of the application. Moreover the provisions in the policy working a forfeiture of insured's rights in the event of suicide or service on a railway train are contained in the same paragraph and are on equal footing.

The unanimous conclusion of the Virginia Court in its first opinion was that both provisions (as to suicide and service on railway trains) were identical in purpose and effect and therefore that the company had excluded both from the coverage of the insurance as a risk not assumed. The Court held that the policy in question had excluded from the coverage an insured who engaged in service on any railway train, and therefore the action of the company was not a contest within the terms of Section 4228.

The opinion of the Circuit Court of Appeals of which we complain is in full accord with the first decision of the Virginia Supreme Court in the *Massey case.* The first Virginia decision as quoted above stated, "The policy in question limited its coverage by excepting from its operation and effect the assured, if he should engage in service on a railroad train. The engagement in such service *ipso facto* put him outside the folds of its protection. The hazards of railway service were never assumed by the company because they were expressly excepted". (159 Va. 848)

Again, we call to the attention of the Court an excerpt from the first opinion in the *Massey case:*

"We hold that the action taken by the appellant is not a contest of the policy, in the meaning of the statute; that the risk taken by Charles A. Proctor, in engaging in the railroad service which resulted in his death, was without the coverage of the policy; that the company did not insure his life against such hazard; and that the trial court erred in sustaining the demurrer.

"(9) It is perfectly plain that an insurance company is not liable for a loss not covered by its policy." (159 Va. 849)

Now we quote from Judge Parker's opinion in the present case:

"The contention that the suicide clause here is a mere condition subsequent, breach of which may avoid the policy but which does not amount to a limitation of liability, will not bear analysis. The clause relates, not to matters effecting the risk, but to the risk itself. Breach of a condition subsequent avoids the policy so that it no longer covers the risk insured against; but where a life policy contains a suicide clause, suicide is simply not a risk insured against in the first instance. A life policy promises payment in case of death; and the office of the suicide clause in such a policy is to except death by suicide from that promise. It is clear, therefore, that the suicide clause, whether it provides that the policy shall be void in case of suicide or that suicide is not a risk covered, is necessarily a limitation on coverage. Its effect is to except death by suicide from the promise to pay the amount of the policy in case of death." (R. 29).

It will thus be seen that the opinion of the Circuit Court of Appeals and the first Massey opinion are in entire agreement.

But, unfortunately for respondent's contention, there was a rehearing in the Massey case and the Virginia Su-

preme Court of Appeals reversed itself and in the second opinion - - holds that "an insurance company is not liable for a loss not covered by its policy", but that

> "(12) Here the policy is a flat contract of insurance. In its inception no exceptions appear upon its face, and if defeated it must be, not because of original reservations, but because of some covenant broken. The latter possibility is one which the statute was designed to meet." (159 Va. 853)

In reaching this conclusion the Court clearly distinguishes between the effect of the language used in the policies here in question; to-wit in the event of suicide "this policy shall be void and shall have no value" and the language used in the policies involved in most of the cases cited by the Virginia Court; to-wit suicide "is not a risk assumed" under this policy. The Virginia Court saw a sharp difference as appears from its comment on the distinction between a Minnesota case and a Michigan case as follows:

> "In *Bowman* v. *Surety Fund Life Ins. Co.* 149 Minn. 118, 182 N. W. 991, 992, the policy contains this provision: 'This policy shall be void if the insured shall engage in army or navy service in time of war without the written consent of the company, or shall become intemperate in the use of intoxicating liquors, chloral, cocaine or opium to the extent to impair the health of the insured.' The insured, without such written permission, went into military service and was killed in battle. That court held that it was dealing with a condition broken, and distinguished it from *Ruddock* v. *Detroit Life Ins. Co.*, 209 Mich. 638, 177 N. W. 242, 243, which dealt with this provision: '*** Military or naval service in time of war is not a risk assumed under any policy hereunder applied for ***.' In the one case there never was coverage; in the other there was complete coverage in the beginning. The defense was a condition subsequent broken. *Forfeitures defeat an existing right, but a right which never existed can never be forfeited, and this is the distinction*

between those policies which declare that certain risks are not assumed and those which declare that they may be defeated by some subsequent happening." (159 Va. 852, 853.) (The italics are ours.)

The Virginia Court in its consideration of the proper construction of Section 4228 of the Code of Virginia reviewed many insurance cases dealing with suicide and incontestable clauses. Most significant to this case is this language of the Court:

"Judge Cardozo, in commenting upon *Northwestern Mutual Life Ins. Co.* v. *Johnson*, 254 U. S. 96, 41 S. Ct. 47, 65 L. Ed. 155, made this observation: 'The clause there in question was not a limitation as to coverage. It was a provision for a forfeiture. In case of the suicide of the insured, whether sane or insane, the policy was to be "void".'

"It was upon its face incontestable after one year, coupled with the further condition that it was to be void should the insured 'die by his own hand'. The insured committed suicide, and it was held that there could be a recovery because of the incontestable clause, and not because there was no coverage. Continuing, Judge Cardozo, C. J., said: '*** with such a clause the death of the insured, coupled with the payment of the premiums, will sustain a recovery in the face of a forfeiting condition. It is quite another thing to say that the same facts will prevail against a refusal to assume the risk'.

"*This sound distinction appears in many cases.*

"*Had the policy declared that 'death from suicide is a risk not assumed' a different conclusion would doubtless have been reached. Our application puts death from suicide and death from service on any railway train upon a common footing.*" (159 Va. 851, 852)

Remember that when the Virginia Court used the language which has been last above quoted it was considering

the construction of Section 4228 of the Code. Remember that that section sets out the general rule to the effect that in an action on a life insurance policy "it shall be no defense that the insured committed suicide" and also provides that the insurer may avoid this general rule for a limited period of time by including in its policy "*an express provision . . . . limiting the liability of the insurer.*" Surely the Virginia court must have read this statute before construing it and certainly the terms of that statute must have been clearly in its mind when it quoted from and commented upon *Metropolitan Life Ins. Co.* v. *Conway*, (1930) 252 N. Y. 449, 169 N. E. 642.

It seems to us that under the facts of the Massey case the holding with respect to the defense asserted, to-wit service on any railway train necessarily carries with it a similar holding as to the defense of suicide. The Virginia Court said so in no uncertain terms.

The Virginia Court relied upon the opinion of Judge Cardozo and by doing so expressly held that a suicide clause that makes a policy "void" is not a limitation as to coverage but is a provision for a forfeiture.

What was the decision of the Virginia Court in the Massey case? We insist that it cannot be limited to the question whether an insured engaged in a forbidden occupation or whether he died as a result of an airplane flight prohibited by the terms of the policy or whether he committed suicide. The sole question was the effect of certain language in the policy identical with that contained in the policies here in issue. Did that language have the effect of limiting liability or excluding a certain type of risk? In the first opinion the Virginia court obviously took the same view that the Circuit Court of Appeals has taken in this case and said:

> "The terms of the policy amounted in plain and unambiguous terms to those contemplating the protection of insurance that the issuing company would

> not assume the risks incident to the hazardous occupation of service on railway trains." (159 Va. 843)

Again the Virginia Court said of the policy in the Massey case:

> "The hazards of railway service were never assumed by the company because they were expressly excepted." (159 Va. 848)

As we have already pointed out the holding was "that the risk taken by Proctor in engaging in railroad service was without the coverage of the policy; that the company did not insure his life against such hazards" and, therefore, that the action taken by the company was not a contest. We insist that this is precisely the view of the Circuit Court of Appeals in this case. In so holding the Circuit Court of Appeals has completely ignored the fact that upon the rehearing the Virginia Court held precisely to the contrary. The second opinion as we have pointed out definitely and positively distinguishes the effect of language such as is used in the policies here in question and language which clearly excludes death by suicide or death in a prohibited occupation as a risk not assumed by the insurer. In this respect it is plain that when the Circuit Court of Appeals says that "it is clear, therefore, that the suicide clause whether it provides that the policy shall be void in case of suicide or that suicide is not a risk covered is necessarily a limitation on coverage" (R. 29) its holding is in the teeth of the Virginia Court's opinion on the same subject. However the question may have been decided in other states and however much the rule applied in other states may seem superior to the Federal courts, the rule thus announced by the Circuit Court of Appeals is not in accordance with the Virginia law.

At the risk of being tedious we briefly summarize what we consider was the question decided in the Massey case. We have pointed out that the application provided that if the insured died by suicide or in service on any railway train any agreement under the application should thereupon become *null and void.* In fact there were other conditions

which would void the policy such as death by flight in an airplane, or as a result of a duel, or in violation of a law, etc. or as a result of engaging in blasting, mining, submarine operations, or in the manufacture, handling or transportation of inflammable or explosive substances, or in naval or army service in time of war. (159 Va. 837). We have also pointed out that the policy itself in clause IV definitely bound the insured to most of the provisions set out in the application (159 Va. 832) and in clause VI there was a distinct provision voiding the insurance feature of the contract in the event of the failure of the insured to perform his covenants made in the application or in case of suicide or death in consequence of a violation of the law. These provisions of the application and the policy definitely presented the question of whether the language used had the effect of limiting the liability of the insurer in the cases thus referred to. They definitely raised the question of whether the insurer had excluded the risks mentioned. Not one of them but all of them. Both the application and the policy had definitely provided that in the event of the occurrence of the above mentioned events, the policy should be null and void. If the language used had the effect of either limiting liability or excluding risks then that principle applied to all of the contemplated events and not merely to engaging in service on a railway train, which was directly in issue in the Massey case. The Virginia court held in the second opinion that the language used did not limit liability nor exclude risk. It treated that language as setting up certain conditions subsequent by which a forfeiture of the policies was attempted to be worked. It held that the purpose failed because of the incontestable clause of the policy and the language of Section 4228 of the Code of Virginia. It was manifestly of the opinion that in order to avoid the incontestable clause and the Code section in question the policy must in plain terms expressly limit liability or exclude a risk. That is precisely what the suicide clause of the policies here in issue definitely fails to do and therefore and thereby it comes within the influence and control of the Massey case. It may be true that the construction of the suicide clause by the Circuit Court of Appeals from the viewpoint of general law appears

to that court to be quite superior to the holding of the Supreme Court of Appeals of Virginia in the Massey case. It may be that this court will agree that the rule which the Circuit Court of Appeals has applied in the present case seems superior to it from the viewpoint of general law. Nevertheless, we insist that such a holding is not the Virginia law and is directly in conflict with the direct expression of the Virginia court on the subject. If so both this court and the Circuit Court of Appeals is bound by the Virginia law regardless of whether they agree with it or not.

We, therefore, earnestly contend that in this case the Circuit Court of Appeals has decided an important question of local law in a way probably (and in our humble view certainly) in conflict with applicable local decisions.

POINT B.

The decision of the Circuit Court of Appeals is in conflict with the decision of another Circuit Court of Appeals, Badger v. Hoidale, (C. C. A. 8: 1937), 88 F. (2) 208, 109 A. L. R. 798.

The matter at issue and the decision of said other Circuit Court of Appeals was on the binding effect on Federal Courts of the considered dicta of State Court. The Court in the present case says that: "Plaintiff relies upon a dictum in the case of *United Security Life Ins. & Trust Co.* v. *Massey*, 159 Va. 832, 164 S. E. 529, 167 S. E. 248, 85 A. L. R. 306. That case was one involving a promissory warranty against engaging in a forbidden occupation. The holding was that the incontestability clause forbade a contest based upon breach of this condition. While language was used indicating that this would be the proper holding if breach of condition related to the suicide clause, the mind of the court was not directed to that point and no account was taken of the limitation of coverage necessarily involved in such a clause. The Court apparently assumed, in the language relied on, that suicide merely defeated liability under the policy as upon a condition broken, overlooking the fact that the necessary effect of the suicide clause was to exclude liability in case of suicide." (R. 29).

It will be seen that the Circuit Court of Appeals does admit that the Virginia Court held that a suicide provision as in the instant case did work a forfeiture and was not a limitation of liability. The Court, as stated above, said "the mind of the Court (Va.) was not directed to that point". The petitioner begs to take issue with that statement, for in the two opinions rendered by the Virginia Court there was discussed at length every case that the respondent cited in the Circuit Court of Appeals as to the effect of a suicide clause with the sole exception of Moore v. Bankers Credit Life Ins. Co., 223 Ala. 373, 136 So. 798, and it was only after a thorough consideration of these cases dealing with the suicide clause as a defense that the Virginia Court used its carefully chosen language on the suicide clause and thereafter decided the case before it. Thus, while petitioner does not admit that the Massey case is dicta insofar as its decision should be decisive of this case, yet if it was dicta then surely it was considered dicta.

However, the Circuit Court of Appeals speaking of the Massey case says:

> "But we would not feel bound to follow it in any event. We recognize, of course, our duty to ascertain and apply the law of Virginia to the facts of the case; but mere dicta have never been received as conclusive evidence of the law of any state, and clearly they ought not be followed when opposed to what we regard as the sound and reasonable rule arising out of the common law of the state." (R. 31).

We think that by this language the Circuit Court of Appeals ignored the opinion of Judge Wheeler in *National Bank of Oxford* v. *Whitman*, (N. Y. D. C.; 1896) 76 F. 697, when in discussing the effect of a certain decision of the Supreme Court of Kansas he said:

> "That the construction of the constitutions and statutes of states by their tribunals is binding is not questioned, but this declaration is said to be so far merely obiter as not to be authoritative. The question

whether the action is transitory, and could be maintained without the state, was not directly in judgment; *but it was so before the court, in construing the provisions of the constitution and statutes together, that it appears to have received full consideration.* The opinion of the court upon it is entitled to great weight elsewhere." (76 F. 698) (Italics are ours.)

This case was considered on appeal by the Circuit Court of Appeals for the Second Circuit, 84 Fed. 288 (C. C. A. 2: 1897) and the Supreme Court of the United States, 176 U. S. 559, 20 S. C. A. 477, 44 L. Ed. 587 (1900) and neither of these courts criticised the above quotation from Judge Wheeler's opinion.

But still more important, it seems to us that the excerpt quoted from the opinion of the Circuit Court of Appeals in the present case is in the teeth of the holding of the Circuit Court of Appeals for the Eighth Circuit in *Badger* v. *Hoidale,* (C. C. A. 8: 1937), 88 F. (2) 208, 109 A. L. R. 798, when that court commented upon a certain opinion of the Supreme Court of Minnesota as follows:

"(2-6) This was probably dictum. But the interpretation and construction of the Constitution of a state is peculiarly within the province of the highest court of the state, and its construction will be followed by the national courts. *Blue Valley Creamery Co.* v. *Consolidated Products Co.* (C. C. A. 8) 81 F. (2d) 182. *Considered dictum of that court should not be ignored when a federal court is attempting to construe or ascertain the meaning of the local law,* whether it be the state statute or the State Constitution. *Blue Valley Creamery Co.* v. *Consolidated Products, Co.,* supra; *Hawks* v. *Hamill,* 288 U. S. 52, 53 S. Ct. 240, 77 L. Ed. 610." (88 F. (2) 211.) (Italics are ours.)

We insist that the Circuit Court of Appeals for the Fourth Circuit has while attempting to construe or ascertain the meaning of Virginia law completely ignored the considered dictum of the Virginia Court which clearly shows

the viewpoint of that court on the question involved. In this respect its holding is directly contra to that of the Eighth Circuit.

POINT C

The decision of the Circuit Court of Appeals in the present case is in conflict with that of the Supreme Court of the United States on an important question of Federal law, to-wit: The deference which is due to a local court on a local question of law even though the language of the lower court be considered dictum and something less than a decision.

The question here involved is, of course, quite like that presented in Point B. It will be observed that Judge Parker, speaking for the Circuit Court of Appeals, in justification of its refusal to be bound by the language of the Massey case cites *Carroll* v. *Carroll*, (1853) 57 U. S. 275 (16 How. 275) 14 L. Ed. 936. (R. 31). He completely ignores *Hawks* v. *Hamill*, (1933), 288 U. S. 52, 53 S. C. R. 240, 77 L. Ed. 610. In the last mentioned case this court had under consideration the construction of a provision of the constitution of Oklahoma and the weight and effect of decisions construing that provision by the Supreme Court of that state. The point was made that the Oklahoma decisions were dicta. The Supreme Court met the issue squarely in an opinion by the lamented Mr. Justice Cardozo. We quote from that opinion as follows:

> "We do not now determine what meaning we would give to the Oklahoma Constitution if the question were before us as an original one, unhampered by any pronouncement of the courts of that state. Much can be said in support of the respondents' position that the perpetuities denounced are those arising from the creation of future estates or from restraints upon alienation without reasonable limit. The question is one distinctively local in origin and content." (288 U. S. 56, 57.) * * *

"We are urged by the respondents to exert a power of independent judgment though the law to be interpreted be a constitution or a statute, and not merely the form of law which has come to be spoken of as general." (288, U. S. 57, 58.) * * * *

"Obedience is due to the courts of the state if the decisions claiming fealty are so many and unequivocal as to make out a 'rule of property.' *Edward Hines Yellow Pine Trustees* v. *Martin*, supra, at pp. 463, 464. As to this there is no denial. The argument is that the fetters of obedience are released when there is only a single state decision, and this subsequent to the transaction out of which rights and duties have developed." (288 U. S. 58) * * *

"Choice is not so free as the argument assumes. If the single decision interpreting a constitution or a statute is clear and unequivocal, submission to its holding has developed in these days into a practice so nearly uniform that there is little need to consider whether under pressure of extraordinary circumstances there is a privilege to deviate. Whatever doubt as to the practice may have prevailed in days gone by has been dispelled by recent judgments. *Chicago, M. & St. P. & P. R. Co.* v. *Risty*, 276 U. S. 567, 72 L. Ed. 703, 48 S. Ct. 396, supra; *Sioux County* v. *National Surety Co.*, 276 U. S. 238, 72 L. Ed. 547, 48 S. Ct. 239, supra. *Indeed the radiating potencies of a decision may go beyond the actual holding. A wise comity has decreed that deference shall at times be owing, though there may be lacking, in the circumstances, a strict duty of obedience.* Cf. *Sim.* v. *Edenborn*, 242 U. S. 131, 135, 61 L. Ed. 199, 203, 37 S. Ct. 36. *An opinion may be so framed that there is doubt whether the part of it invoked as an authority is to be ranked as a definitive holding or merely a considered dictum.* What was said in *Okmulgee* v. *Okmulgee Gas Co.*, 140 Okla. 88, 282 Pac. 640, supra, as to the meaning of perpetuities was probably intended to be a definitive holding. Cf. 141 Okla. 98, 284 Pac. 70; 141 Okla. 100, 284 Pac. 12. To be sure there is room

> for argument that limiting distinctions will have to be drawn in the future. We must leave it to the courts of Oklahoma to declare what they shall be. But *the result will not be changed though the definition of perpetuities be something less than a decision. At least it is a considered dictum, and not comment merely obiter.* It has capacity, though it be less than a decision, to tilt the balanced mind toward submission and agreement." (288 U. S. 58, 59.) (Italics are ours.)

We insist that the decision of the Circuit Court of Appeals in the present case is in the teeth of the rationale and holding in *Hawks* v. *Hamill*, supra.

POINT D

The Circuit Court of Appeals has refused to follow the mandate of this court "to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule however superior it may appear from the viewpoint of general law".

West v. *American Telephone & Telegraph Company*, (1940) U. S. , 61 S. C. R. 179, 85 L. Ed. (Adv. Opinions) 147.

The opinion of the Circuit Court of Appeals in the present case clearly shows that that court has refused to follow what it calls the dictum in the Massey case because it is "opposed to what we regard as the sound and reasonable rule arising out of the common law of the state." (R. 31).

Here it seems to us that the distinguished Circuit Judge who wrote the opinion below completely loses sight of the fact that the common law of Virginia with respect to the question at issue is in no wise material to this cause. It is quite true that *Security Life Insurance Co. of America* v. *Dillard*, 117 Va. 401, 84 S. E. 656, held that there could be no recovery on a life insurance policy in case of suicide. That case was decided March 11, 1915. At the very next succeeding session of the General Assembly the rule thus

laid down was abrogated by Chapter 99 of the Acts of the Virginia Assembly of 1916 which was the forerunner of Section 4228 of the Code of Virginia in its present form. The trial court based its decision upon Section 4228 of the Code of Virginia and in the construction of that section by the Supreme Court of Appeals of Virginia in the Massey case, supra. If the Circuit Court of Appeals has attempted to decide this case upon what it concedes to be the common law of Virginia, it has plainly missed the crucial and controlling point which is involved. We insist that the Circuit Court of Appeals is bound by the statute law of Virginia and where by statute a common law rule has been abrogated it must follow the statute and not the common law. Moreover, it is bound by the construction of a statute by the appellate court of the state in question.

It is true that the Circuit Court of Appeals cites *Darden* v. *North American Benefit Association*, (1938) 170 Va. 479, 197 S. E. 413, to sustain its position but as we see it that case involved a clear question of limitation of liability in express language and not a forfeiture as is provided by the policies here in question. We insist that the only evidence of any applicable "rule arising out of the law of the state" of Virginia is found in the opinion in the Massey case. We further insist that in the light of the exhaustive consideration which the Virginia court gave to suicide defense cases, it is inaccurate to say as Judge Parker says that "the mind of the (Va.) court was not directed to that point and no account was taken of the limitation of coverage necessarily involved in such a clause (suicide clause)". (R. 29). It is further inaccurate to say as Judge Parker did say that "the (Va.) court apparently assumed in the language relied on that suicide merely defeated liability under the policy as upon a condition broken overlooking the fact that the necessary effect of the suicide clause was to exclude liability in case of suicide". (R. 29).

We insist that the Virginia Court did not overlook the effect of the suicide clause. On the contrary it held that if there was such language as plainly excluded suicide as a risk then in such case the clause was an effective defense,

but that when an insurer used the language which is present in the policies here involved such language worked a forfeiture, reliance upon the same involved a contest and, therefore, the incontestable clause and the statute took precedence and defeated such a defense. It is our view that certainly the Massey case is "available data" from which may be ascertained the law of Virginia and in such event it is the duty of the Circuit Court of Appeals for the Fourth Circuit to apply the law as thus ascertained "rather than to prescribe a different rule however superior it may appear from the viewpoint of general law." We think this is the holding of *West* v. *American Telephone & Telegraph Company*, (1940) U. S. , 61 S. C. R. 179, 85 L. Ed. (Adv. Opinions) 147. In that case Mr. Justice Stone states the question presented as follows:

> "The Circuit Court of Appeals in this case, in which jurisdiction rests exclusively on diversity of citizenship, declined to follow the ruling in West v. American Teleph. & Teleg. Co., 54 Ohio App. 369, 7 NE (2d) 805, 7 Ohio Ops. 363, of the Cuyahoga County Court of Appeals, an intermediate appellate court of Ohio. The question for decision is whether, in refusing to follow the rule of law announced by the state court, the court below failed to apply state law within the requirement of paragraph 34 of the Judiciary Act of (September 24) 1789, 1 Stat. at L. 92, chap. 20 and of our decision in Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487." (85 L. Ed. Adv. Opinions 147)

There was no Ohio statute, nor any decision of the Supreme Court of Ohio determinative of the point involved. As indicated in the above-quoted excerpt, there was a decision by an intermediate appellate court which was directly in point. The Circuit Court of Appeals for the Sixth Circuit held that this decision was not binding on the federal courts. The Supreme Court reversed that decision, holding that the federal trial court, sitting in Ohio, was bound by the decision of the intermediate appellate court, and was "not free to apply a different rule, however desirable

it may believe it to be, and even though it may think that the state Supreme Court may establish a different rule in some future litigation".

In reaching its conclusion, the Court indulges in certain reasoning which we regard as most helpful to this Court in reaching its decision on the petition here presented. We quote that language as follows:

> "But the obvious purpose of paragraph 34 of the Judiciary Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship. That object would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken.
>
> "*A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them.* In those circumstances *a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle* or that another is preferable. *State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear* from the viewpoint of 'general law' and however much it may have departed from prior decisions of the federal courts. See Erie R. Co. v. Tompkins, supra (304 U. S. 78, 82 L. Ed. 1194, 58 S. Ct. 817, 114 A. L. R. 1487); Russell v. Todd, supra (309 U. S. 293, 84 L. Ed. 762, 60 S. Ct. 527)." (85 L. Ed. Adv. Opinions 150) (Italics are ours.)

It seems to us that the Circuit Court of Appeals has completely ignored this mandate of the Supreme Court of the United States.

POINT E

In any event it is desirable that the Supreme Court of the United States shall determine (if it has not already determined) the extent to which a Federal court in determining questions of local law is bound by considered dicta of local courts and to what extent such Federal courts may rely upon such considered dicta as available data for the purpose of determining local law.

The argument which we have made under Points C and D seem quite sufficient to indicate the necessity and desirability of a definite decision by this court of the above stated questions in the event that we have misapprehended the meaning and effect of the decisions which we have cited and quoted from in those two branches of our argument which as we see it have already decided the questions. We do not deem any further comment necessary upon this point.

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 92

WILLIAM M. MITCHELL, ADMINISTRATOR OF THE ESTATE OF KIT C. KOGER, PETITIONER

v.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, RESPONDENT

RESPONDENT'S BRIEF OPPOSING CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 92

WILLIAM M. MITCHELL, ADMINISTRATOR OF THE ESTATE OF KIT C. KOGER, PETITIONER

v.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

PRELIMINARY

As the petitioner, William M. Mitchell, Administrator of the Estate of Kit C. Koger, is referred to in the petition and supporting brief as the "plaintiff" and

the respondent, New England Mutual Life Insuran Company, is referred to as the "defendant", the sa designation will be followed herein.

OPINIONS OF COURTS BELOW

The opinion of the District Court was written District Judge A. D. Barksdale and filed October 3 1940. It appears on pages 13-20 of the record and not reported in Federal Supplement. The opinion the Circuit Court of Appeals (Circuit Judges Park Soper and Dobie, Judge Parker writing) was filed Ma 10th, 1941, and appears on pages 24-33 of the reco It is reported in 118 Fed. (2d) 414.

JURISDICTION

The order of the Circuit Court of Appeals which under consideration is dated March 10th, 1941 (R. 3 It reversed a judgment for the plaintiff on the ple ings and remanded the case for trial on the merits. T petition for writ of certiorari was filed May 20th, 1941

The jurisdiction of this Court is invoked under U. S. C. A., Section 347.

STATEMENT OF THE CASE

As the plaintiff's summary statement of the c (petition, 1-4) is substantially correct, it is adopted the defendant. The plaintiff's reference (third pa graph, petition, 2) to the defense asserted by the ans is not clear, but the last three words of the paragr probably resulted from a typographical error. The fendant alleged in its answer that the insured commi suicide by shooting himself through the chest wit shotgun and that suicide less than two years after

issuance of the policies constituted a complete defense to this action. The position of the plaintiff is that as death occurred more than one year after the issuance of the policy, the Virginia one-year "incontestable" statute precluded the defendant from asserting the defense of suicide notwithstanding the fact that the same statute contained a two-year "suicide" clause.

QUESTION PRESENTED

The question involved is: Under the law of Virginia is the defense of suicide available to the defendant in an action on a life insurance policy which had been in effect more than one year but less than two years and which contained the suicide and incontestable clauses quoted at page 3 of the petition?

THE ARGUMENT

(A) In Holding that Defendant's Suicide Clause Complies with the Virginia Statute, Circuit Court of Appeals Applied Virginia Law

The Circuit Court of Appeals has not "decided an important question of local law in a way probably in conflict with applicable local decisions." On the contrary, in holding that the defendant's suicide clause is a valid limitation of liability under Section 4228 of the 1936 Virginia Code, the Circuit Court of Appeals followed all applicable Virginia decisions. The "decision" in *United Security Life Insurance & Trust Company* v. *Massey*, 159 Va. 832, 164 S. E. 529, 167 S. E. 248, 85 A. L. R. 306, which involved the breach of a promissory representation and not a limitation of liability, is not in point. The portion of that opinion relied upon by

the plaintiff was "mere" *dictum* that does not have even persuasive value because of the later "decision" in *Darden* v. *North American Benefit Association*, 170 Va. 479, 197 S. E. 413.

(*1*) *Defendant's Suicide Clause Is a Valid Limitation of Liability Under Virginia Code Section 4228*

As the opinion of the Circuit Court of Appeals is considered a complete answer to the plaintiff's "Point A" (brief, 10-25), it will be quoted from at length.

The statute determinative of the rights of the parties is Section 4228 of the Virginia Code of 1936, which is quoted in the petition (3-4). This statute, which limits the "incontestable" period to one year, also provides that "if there shall be an express provision in the body of such policy limiting the liability of the insurer in the event that the insured shall, within two years from the date thereof, die by his own act (whether sane or insane), such provision shall be valid but the insurer shall be obligated to return, or pay, at the least, the amount of the premiums paid on account of such policy." Each policy provided that in the event of suicide within two years "this Policy shall be void and shall have no value; but in such event the Company will return any premiums paid." (R. 11)

The defendant earnestly contends that its suicide clause complies with the Virginia statute. It is limited to two years; it contains an agreement to refund the premiums paid; and the effect of it is to limit the liability of the company to the return of said premiums paid in the event of suicide within two years.

In construing the statute it should be remembered, as pointed out by Judge Parker (118 Fed. (2d) at 416, R. 25), "that under the common law of Virginia it had been decided that there could be no recovery on a life insurance policy in case of suicide. Security Life Ins. Co. of America v. Dillard, 117 Va. 401, 84 S. E. 656, Ann. Cas. 1917D, 1187. The statute quoted was, therefore, in derogation of this common law rule; and the proviso relating to suicide, the purpose of which was to preserve the common law rule for the limited period of two years where provision to that effect is contained in the policy, should be given a liberal and not a strained construction."

Judge Parker then said (118 Fed. (2d) at 417, R. 25-26):

> "The question in the case, then, is whether the suicide clause quoted above is a provision 'limiting the liability of the insurer in the event that the insured shall, within two years from the date thereof, die by his own act', within the meaning of the proviso of the statute. If it is such a provision, the defendant is clearly not liable under the policies, notwithstanding the incontestability clause; for as the statute provides for a two year suicide clause and requires a one year incontestability clause, it could not have been intended that the latter should cut short the period provided by the former. If it is not such a provision, the statute precludes the defense of suicide, irrespective of the provisions of the incontestability clause. This being true, it is unnecessary to consider the cases dealing with the effect of the incontestability clause on defense under the suicide clause. See notes 55 A. L. R. 549, 67 A. L. R. 1364. *The law of Virginia is, of course, controlling;* and, as the question is one of the interpretation and application

of a state statute, this would be true irrespective of the overruling of Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865, by Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487.

"*It is perfectly clear, we think, that any language showing that liability of the insurer under the policy shall not extend to death from suicide and that, in such event, the premiums paid on the policy shall be returned, is a sufficient compliance with the requirement of the statute.* The purpose of language is to convey thought; and the thought that liability is so limited that, in the event of suicide, the face of the policy will not be paid but the premiums will be returned is quite as well expressed by language to the effect that, in case of suicide, the policy shall be void and the premiums shall be returned as this same thought would be expressed by a provision that suicide is not a risk covered by the policy or that liability under the policy shall not extend to suicide. *The idea that there is any magic in a particular phrase or that a set form of words must be used to embody such a contractual provision as this, is one which has no place in modern legal thinking.* A policy of insurance is the contract of the parties in which the promises of the company are definitely set forth; and a provision to the effect that, in case of suicide, a life policy shall be void, is as definite a statement as could possibly be made that the coverage of the policy does not extend to suicide or, what is the same thing, that the liability of the company is so limited as not to cover suicide."

(Italics supplied)

The plaintiff has based his whole case upon what was actually "mere" *dictum* in the *Massey* case, *supra*, page 3. He is not relying on those decisions (minority

view) to the effect that there is a conflict between the "incontestable" and "suicide" clauses. For the reasons given by Judge Parker in the foregoing quotation, it is not necessary "to consider the cases dealing with the effect of the incontestability clause on defense under the suicide clause." (118 Fed. (2d) at 417, R. 26.) But it is interesting to note that those courts which hold that there is a conflict between the two clauses and those which hold that there is no conflict do not base their decisions upon any difference in phraseology of the clauses. In neither line of authority "has the question been thought to depend upon the language of the suicide clause." (118 Fed. (2d) at 417, R. 27; see cases there cited in footnote)

Continuing, Judge Parker said (118 Fed. (2d) at 417-418, R. 27-29):

> " * * * That such a clause as the one here involved is definitely a limitation of liability, however, was the holding in Moore v. Bankers' Credit Life Ins. Co. 223 Ala. 373, 136 So. 798. The exact wording of the clause there was that in case of suicide within two years 'this policy shall be valid only for an amount equal to the premiums received'. The court in holding that there was no conflict between the suicide and incontestability clauses, said: 'We rather construe the policy as simply meaning that, if the insured died by his own hand within the two-year period, the beneficiary should receive only the amount represented by the premiums paid, and this regardless of the date of the institution of the suit, for the suicide clause expressly discloses such was the full extent of the risk assumed during that period.' "

It was admitted by the plaintiff in the lower courts that although the language of the policy in *Moore* v. *Bankers' Credit Life Ins. Co.*, 223 Ala. 373, 136 So. 798, discussed by Judge Parker, *supra*, page 7, "is not identical with that of the policies here involved, we can see no real distinction between the two * * * ." (Appellee's brief in Circuit Court of Appeals, 5)

In regard to the plaintiff's contention that the defendant's suicide clause was not a limitation of liability or exclusion of death by suicide from the coverage of the policy but on the contrary was a condition subsequent, Judge Parker said (118 Fed. (2d) at 418, R. 29):

> "The contention that the suicide clause here is a mere condition subsequent, breach of which may avoid the policy but which does not amount to a limitation of liability, will not bear analysis. The clause relates, not to matters affecting the risk, but to the risk itself. *Breach of a condition subsequent avoids the policy so that it no longer covers the risk insured against; but where a life policy contains a suicide clause, suicide is simply not a risk insured against in the first instance.* A life policy promises payment in case of death; and the office of the suicide clause in such a policy is to except death by suicide from that promise. *It is clear, therefore, that the suicide clause, whether it provides that the policy shall be void in case of suicide or that suicide is not a risk covered, is necessarily a limitation on coverage.* Its effect is to except death by suicide from the promise to pay the amount of the policy in case of death.
>
> "*We find nothing in the Virginia authorities to the contrary.*"
>
> (Italics supplied)

It is submitted that the logic of Judge Parker's opinion is unanswerable. It shows that the defendant's suicide clause complies with Section 4228 of the Virginia Code in that it is a valid limitation of liability. As will be shown, the decision of the Circuit Court of Appeals is also in accordance with the interpretation which the Virginia court has placed upon the statute.

(2) *Virginia Rules of Construction*

It is well settled in Virginia that in construing an insurance contract, each provision must be accorded its reasonable, natural and probable meaning when considered in relation to the whole. Under the guise of construction the court should not make a new contract for the parties.

Ayres v. *Harleysville Mutual Casualty Company*, 172 Va. 383, 2 S. E. (2d) 303, plaintiff's brief, 11, is cited in support of the proposition that *ambiguous* language must be construed against the insurer, but the Virginia court there recognized that the court will not "make a contract for the parties which they did not make for themselves and never intended to make." (172 Va. at 389, 2 S. E. (2d) at 305) See also *Harmon* v. *Farm Bureau Mutual Automobile Ins. Co.*, 172 Va. 61, 200 S. E. 616, and the *Darden* case, *supra*. In the latter case the court said (170 Va. at 482, 197 S. E. at 415): "When the terms and provisions are clear, there must be given to such terms and provisions the construction and effect consonant with the apparent object. The contract of insurance is to be considered and construed as a whole."

In *Kennard* v. *Travelers Protective Association*, 157 Va. 153, 159, 160 S. E. 38, 40, the Virginia court said:

> " 'Policies of insurance, as other contracts, should be construed "according to the ordinary sense and meaning of the terms employed, and, if they are clear and unambiguous, their terms are to be taken in the plain, ordinary, and popular sense." *St. Paul Fire & Marine Ins. Co.* v. *Ruddy* (C. C. A.) 299 F. 189, loc. cit. 193.' *Callen* v. *Massachusetts Protective Ass'n* (C. C. A.) 24 F. (2d) 694, 695."

It is submitted that if the foregoing rules of construction are applied to the defendant's policies, the conclusion is inescapable that they comply with the Virginia statute.

(3) *Doctrine of United Security Life Insurance & Trust Company* v. *Massey*

After reaching the conclusion that the defendant's suicide clause complied with the Virginia statute and after stating that there was no Virginia law to the contrary, Judge Parker said (118 Fed. (2d) at 418-419, R. 29-30):

> " * * * Plaintiff relies upon a dictum in the case of United Security Life Ins. & Trust Co. v. Massey, 159 Va. 832, 164 S. E. 529, 167 S. E. 248, 250, 85 A. L. R. 306. That case was one involving a promissory warranty against engaging in a forbidden occupation. The holding was that the incontestability clause forbade a contest based upon breach of this condition. While language was used indicating that this would be the proper holding if breach of condition related to the suicide clause, *the mind of the court was not directed to that point and no account was taken of the limitation of coverage necessarily involved in such a clause.* The court apparently assumed, in the language relied on, that suicide merely

defeated liability under the policy as upon a condition broken, overlooking the fact that the necessary effect of the suicide clause was to exclude liability in case of suicide. *The court did, however, use language clearly indicating that the principle of the case should apply only to cases where there was a denial of liability because of a condition broken*, saying: 'Forfeitures defeat an existing right, but a right which never existed can never be forfeited, and this is the distinction between those policies which declare that certain risks are not assumed and those which declare that they may be defeated by some subsequent happening.' Here the risk of death from suicide was never assumed, for the provision was that the policy should be void in such event and the only liability then existing should be the repayment of premiums. *This is very different from the case of a warranty not to engage in a forbidden occupation.* There the liability for death attaches upon the issuance of the policy and is defeated by breach of the condition. *Here liability for death from suicide within two years is precluded by express provision of the policy itself.*"

(Italics supplied)

The facts in the *Massey* case and those in the instant case are entirely different. The insured was there engaged in railway service, a prohibited occupation, when the policy was issued, and he continued at that occupation. As he violated a promissory warranty, the company had the right at any time within a year after the issuance of the policy to bring a suit for rescission. If he had died within a year from *any* cause, the company could have "contested" the *validity* of the policy under Section 4228 of the Code. The very act of working for the railroad rendered his policy voidable. All of his rights were terminated by the terms of the policy and this was true regardless of what caused his death. But

as he died more than one year after the issuance of the policy, Section 4228 of the Code prevented the company from contesting the validity of the policy.

In the instant case, however, the insured had full life insurance protection at all times, subject to the limitation that if he committed suicide within two years, the liability of the company was limited to the return of the premiums paid. As Judge Parker pointed out, the risk of death from suicide was never assumed under the policies involved in this case. That fact distinguished it from the *Massey* case, which involved the breach of a promissory warranty, and made the principle of the *Massey* case inapplicable.

All that the Virginia court decided in the *Massey* case was that there had been a breach of a condition subsequent for which the company could have brought a suit for rescission within a year after issuance of the policy but that Section 4228 of the Code precluded the company from "contesting" the policy after it had been in force for more than a year. The decisions relied upon by the Virginia court indicate that all that it was deciding was the distinction between (1) a risk not covered by the policy—regardless of the manner in which the risk was excluded—and (2) facts which justify rescission of the policy. The language used by the Virginia court should be limited to the facts of that case. What it said in regard to suicide was "pure" *dictum*.

The District Court in this case recognized that the court in the *Massey* case did not *decide* the question here involved. It expressly said that the suicide clause "was not involved" in the *Massey* case (R. 16). District Judge Barksdale continued (R. 17):

"It is true that the *Massey* case is not a precise adjudication of the question here involved. It was not necessary for the court, in deciding the *Massey* case, to consider the suicide clause in the policy. *As a matter of fact, the suicide clause in the Massey policy failed to comply with the provisions of Section 4228 in that it contained no provision for the return of premiums and this phase was not considered by the court.*"

(Italics supplied)

Certain inaccurate and misleading statements in plaintiff's brief will now be considered. He says (brief, 22) with reference to the *Massey* case, "The sole question was the effect of certain language in the policy identical with that contained in the policies here in issue." The policies are entirely different. The one in the *Massey* case provided that if certain promissory warranties were broken, the policy would be "void". But in the instant case the policy provided that in case of suicide within two years, "this Policy shall be void and shall have no value; *but in such event the Company will return any premiums paid.*" (R. 11; italics supplied) The plaintiff has conveniently ignored the italicized portion of the clause, having referred to it only once (summary statement, petition, 3).

Again he says (brief, 22) that by relying upon the opinion of Judge Cardozo (in *Metropolitan Life Insurance Co.* v. *Conway*, 252 N. Y. 449, 169 N. E. 642) the Virginia court "expressly held that a suicide clause that makes a policy 'void' is not a limitation as to coverage but is a provision for a forfeiture." Such a clause is not here involved. Judge Cardozo there pointed out that if there is a real forfeiture, the insured loses the privilege of receiving the surrender value of the policy

or the equivalent benefits. But if there is a limitation of liability, the privilege of receiving the benefits survives to the extent stated in the policy. In the instant case the defendant was obligated to return the premiums paid.

The plaintiff makes a similar inaccurate statement when he says (brief, 20) that the Virginia court in the *Massey* case distinguished between the effect of "language used in the policies here in question" and those policies which say that suicide is a risk not assumed. Although he quotes a portion of the defendant's suicide clause, he again omits that portion of the clause that shows that it is a limitation of liability and which also shows that it is entirely different from the policy in the *Massey* case.

One would think from reading the plaintiff's brief (17) that the quotation from the *Massey* case beginning with the paragraph numbered "(9)" is from the original opinion, as is the paragraph immediately preceding it, but such is not the case. It is from the opinion on the petition to rehear. The same mistake occurs on page 19 of plaintiff's brief. It is to be noted that in its second opinion in the *Massey* case the Virginia court recognized that "an insurance company is not liable for a loss not covered by its policy." (159 Va. at 850, 167 S. E. at 249)

The *dictum* in the *Massey* case on which the plaintiff relies was qualified by the "decision" in the later *Darden* case, *supra*, page 4 which will next be discussed.

(*4*) *Massey "Dictum" Qualified by Darden "Decision"*

Judge Parker said (118 Fed. (2d) at 419, R. 30-31):

"In a later case, Darden v. North American Benefit Association, 170 Va. 479, 197 S. E. 413, 416, *the point, we think, was directly involved and the holding was in accordance with the view that we have taken.* In that case the policy provided that the beneficiary should be entitled to the payment of only one-fifth of the amount otherwise due if the insured died of heart disease having its incipiency within two years from the date of the policy. In holding this to be a limitation of liability not affected by the incontestability clause, the court said: 'The facts in the instant case are wholly different from those in the case of United Security Life Insurance & Trust Company v. Massey, supra. *There a distinction was made between facts which might have warranted a rescission of the contract and those cases involving risks not covered by the contract.* In the instant case there are original reservations and an exemption to a certain extent from the risk assumed. The contract before us neither provides for a forfeiture nor sets up conditions subsequent. The contest here relates to the coverage, and not to the validity of the policy. The defendant is not contesting the policy because of anything occurring in its incipiency. It is relying upon its contract, and as has been aptly said, a reliance upon its contract does not constitute a contest of its validity, but necessarily assumes it.' *Here, as in that case, the contest 'relates to the coverage and not to the validity of the policy.'* The defendant is relying upon the contract, and a reliance upon the contract 'does not constitute a contest of its validity, but necessarily assumes it'. *There can be no distinction in law or in reason between a provision to the effect that upon certain conditions one-fifth only of the face of the policy shall be payable and one to the effect that upon certain conditions the promise of the policy to pay the face amount shall be void and the premiums paid shall be returned.* In either

case, there is a limitation of the liability of the insurer expressed in the face of the policy, not a warranty or condition upon breach of which a liability assumed may be forfeited.

> *"In the light of the decision in the Darden case, we do not think that the dictum in the Massey case upon which plaintiff relies has even persuasive value."*
>
> (Italics supplied)

It will be noted that the Circuit Court of Appeals was of the opinion that the point here involved was directly before the Virginia court in the *Darden* case and that the judgment rendered in the instant case was in accordance with the view adopted by the Virginia court. Under the circumstances Judge Parker thought, and correctly so, that the *dictum* in the *Massey* case did not have even persuasive value.

In his "Point A" (brief, 10-25) which deals with the Virginia law, the plaintiff discusses in detail the *Massey* case, but not once does he refer in that argument to the later *Darden* decision. The latter is referred to only once in plaintiff's brief (31) and it is there discussed in one sentence.

It is submitted that the Virginia court in the *Massey* case recognized that the principle of that case should apply only where there was a denial of liability because of a condition broken; that although the defendant's clause states that in the event of suicide within two years, the policy shall be void, it further provides that the company will refund the premiums paid; that such a clause had the effect of limiting liability or making death from suicide a risk not assumed; that this clause is entirely different from a warranty not to engage in a forbidden

occupation as was involved in the *Massey* case; that the *Massey dictum* was qualified by the *Darden* "decision" to such an extent that the former is not even persuasive authority; and that consequently the defendant's clause is a valid limitation of liability within the meaning of Section 4228 of the Virginia Code.

Under the circumstances the defendant contends that there is no merit in any of the following arguments made by the plaintiff (brief, 12): (1) the language and conclusions of the court in the *Massey* case with respect to suicide are not *dicta;* or (2) even if they be *dicta*, they are "considered *dicta*"; or (3) they are at least "available data" as to what the Virginia law is.

The Circuit Court of Appeals has properly applied the Virginia law and its decision is plainly right.

(B) The "Decision" of the Circuit Court of Appeals Is Not in Conflict with the "Decision" in Badger v. Hoidale (C. C. A. 8th)

In order to assign another reason for allowance of the writ, the plaintiff claims (brief, 25-28) that the instant decision conflicts with the decision in *Badger* v. *Hoidale* (C. C. A. 8th), 88 Fed. (2d) 208, 109 A. L. R.798. Actually there in no conflict in the "decisions". In the *Badger* case, the question involved was whether or not a constitutional amendment which was not entirely self-executing had the effect of repealing a constitutional provision imposing double liability on stockholders of corporations. Although the state supreme court had not directly passed upon the effect of the constitutional amendment, it had said that the legislature, having in mind that the constitutional amendment abolished stockholders' double liability, no doubt enacted the

statute under consideration for the purpose of expediting settlement of the liability of stockholders in insolvent corporations. The Circuit Court of Appeals for the Eighth Circuit said that what the state court had said was "considered *dictum*" which should not be ignored.

But in the instant case, what the Virginia court said in the *Massey* case was not "considered" *dictum*. It was "pure" *dictum*. Even that was qualified by the later *Darden* "decision" to such an extent that it did not have even persuasive value. What Judge Parker said about not following *dictum* was itself *dictum* since the decision of his court was in fact based upon Virginia law. Under the circumstances there is no merit in plaintiff's contention.

The Virginia court did not hold, and the Circuit Court of Appeals did not admit that the Virginia court held, that "a suicide provision as in the instant case" worked a forfeiture, as claimed by plaintiff (brief, 26). The suicide clause in the *Massey* policy and the one in the instant case are entirely different. Here there is a return of premiums paid. Although the Virginia court discussed suicide cases, its attention was not directed to the point here involved.

(C) The Decision of the Circuit Court of Appeals Does Not Conflict with the Decision of this Court in Hawks v. Hamill

Plaintiff's argument (brief, 28-30) is to the effect that the decision of the Circuit Court of Appeals on a question of federal law conflicts with the decision of this Court in *Hawks* v. *Hamill*, 288 U. S. 52, 53 Sup. Ct. 240, 77 L. Ed. 610, in that the court ignored "considered *dictum*" of the Virginia court. Defendant's argument "B", *supra*, pages 17-18, is equally applicable here.

In the *Hawks* case, the respondents claimed a perpetual franchise to collect toll for the use of a bridge. The Oklahoma constitution prohibited perpetuities and monopolies. In holding that the franchise was a perpetuity, this Court pointed out that the Supreme Court of Oklahoma had said that a perpetual franchise is a forbidden perpetuity. This Court recognized that an opinion may be so framed that there is doubt whether a portion of it should be regarded as a "definitive holding" or as a "considered *dictum*". Mr. Justice Cardozo was of the opinion that what the state court had said was probably intended to be a definitive holding, but in any event it was a "considered *dictum*" and "not comment merely *obiter*". It is submitted that the situation in the instant case is entirely different and that the actual decision does not conflict with any decision of this Court.

The Circuit Court of Appeals recognized (118 Fed. (2d) at 419, R. 31) that it was its "duty to ascertain and apply the law of Virginia to the facts of the case; but *mere* dicta have *never* been received as *conclusive* evidence of the law of any state, and clearly they ought not be followed when opposed to what we regard as the sound and reasonable rule arising out of the common law of the state." (Italics supplied) The court very properly referred to *Carroll* v. *Carroll*, 57 U. S. 275 (16 How. 275), 14 L. Ed. 936.

(D) Circuit Court of Appeals Considered All "Available Data" as to What the State Law Is and Then Applied a State "Decision" which Qualified "Pure Dictum" in an Earlier Case

The plaintiff argues (brief, 30-33) that the Circuit Court of Appeals refused to consider all "available data"

as to what is the state law, which decision is contrary to *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 61 Sup. Ct. 179, 85 L. Ed. 146 (advance sheets); but there is no basis for this argument as the federal court applied the Virginia law. It stated that the *Massey dictum* had been qualified by the later *Darden* "decision", which involved the point in question, to such an extent that the *dictum* had no persuasive value. It added that "mere" *dicta* should *not* be considered "conclusive evidence" of the state law. Because the court said that such *dictum* should not be followed if it is opposed to what "we regard" as the common law of the state, the plaintiff tries to create the impression (brief, 30) that the court applied what it considered to be the "superior" rule from the point of view of "general law" instead of applying the "state" law. A mere cursory reading of Judge Parker's opinion demonstrates the fallacy of this argument.

The plaintiff apparently missed the point (brief, 30-31) of Judge Parker's reference to *Security Life Ins. Co. of America* v. *Dillard*, 117 Va. 401, 84 S. E. 656, Ann. Cas. 1917D, 1187, *supra*, page 5. That case was cited solely to show the manner in which Section 4228 of the Virginia Code should be construed.

The plaintiff's one reference to the *Darden* case is then made (brief, 31). The defendant's discussion of the case appears, *supra*, pages 14-17. It is unnecessary to reply to the arguments (brief, 31) that certain of Judge Parker's statements are inaccurate.

Plaintiff repeats (brief, 31-32) the statement frequently made by him that the Virginia court held in the *Massey* case that "the language which is present in the policies here involved" worked a forfeiture. But actually

the language of the policy in the *Massey* case was entirely different from that here involved. The *dictum* of that case was qualified by the later *Darden* "decision." The Circuit Court of Appeals considered the *Massey dictum* and correctly decided that it was not the Virginia law. It then applied the principle of the *Darden* case. *West* v. *American Telephone & Telegraph Co., supra*, page 20, was not overlooked by the Circuit Court of Appeals, which after quoting from *Carroll* v. *Carroll*, 57 U. S. 275 (16 How. 275), 14 L. Ed. 936, said (118 Fed. (2d) at 420, R. 32-33):

> "Nothing in recent decisions has in anywise weakened this rule or the sound basis of reason upon which it rests. In ascertaining the applicable law of the state, we are to consider court decisions and other available sources of local law; and we are to apply court decisions in the light of the well-established stare decisis rule and its limitations. Cf. West v. American Tel. & Tel. Co., 61 S. Ct. 179, 85 L. Ed.___. We are not required, however, to speculate as to how the state court might decide the question before us if it has not already decided it. Nor should we surrender our own judgment as to what the local law is on account of dicta or other chance expressions of the judges of the local courts. The respectful attitude towards the local court, where there has been no decision on the precise question before us, is to consider that question in the light of the common law of the state, with a view of reaching the decision which reason dictates, and with the faith that the local court will reach the same decision when the question comes before it."

(E) Decision of the Circuit Court of Appeals Does Not Involve Important Question of Federal Law which Has Not Been Decided by this Court

Plaintiff's argument (brief, 34) is predicated upon the false assumption that what the Virginia court said in the *Massey* case was "considered *dictum*". Actually it was "pure *dictum*" which had been qualified by the later *Darden* decision. The federal courts must apply the latest "decision" of the state court and not "pure" *dictum* in an earlier case which is no longer persuasive.

(F) The Request for Writ of Certiorari Should Be Denied

The petition and supporting brief present no real question. The opinion of the Circuit Court of Appeals is a complete answer to the only plausible question raised by the plaintiff (Point A), namely, whether or not the court applied the Virginia law. It expressly recognized that the law of Virginia controlled (118 Fed. (2d) at 417, 419, R. 26, 31) and pointed out that there is "nothing in the Virginia authorities to the contrary." (118 Fed. (2d) at 418, R. 29) In fact, its decision was in accordance with the holding of the Virginia court (118 Fed. (2d) at 419, R. 30). No "important" question of state law is involved; only the litigants are concerned.

The decision does not "conflict with the decision of another circuit court of appeals on the same matter." Neither does it "conflict with the applicable decisions of this Court." The decision does not involve an "important question of federal law which has not been, but which should be," decided by this Court. No import-

ant federal question is involved. The judgment for the defendant is plainly right and is in accordance with the law of Virginia.

CONCLUSION

In conclusion, it is respectfully submitted that for the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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FILED
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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1068

WILLIAM M. MITCHELL, ADMINISTRATOR OF THE ESTATE OF KIT C. KOGER, PETITIONER

v.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, RESPONDENT

REPLY BRIEF OF PETITIONER FOR WRIT OF CERTIORARI

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RESPONDENT, AND APPELLANT BELOW

REPLY BRIEF OF PETITIONER FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

CORRECTION OF ERRATA IN ORIGINAL PETITION

Counsel for the respondent very properly point out that the third paragraph on page 2 of the petition is not clear and they correctly assume that this is because of a typographical error. After the word "constituted", which appears in the last line and next to the last line

in said paragraph, the language should be "a complete defense to the life insurance features of said policies".

A further inaccuracy in the petition appears in the statement of the question involved on page 4. In the fourth line of that statement after the word "year", there should appear the language "and less than two years".

The respondent correctly sets out the question involved on page 3 of his brief opposing certiorari.

ARGUMENT

The Darden Case

The respondent relies very heavily upon the case of *Darden* v. *North American Benefit Association*, 170 Va. 479, 197 S. E. 413. In this respect the respondent follows the lead of Judge Parker who spoke for the Circuit Court of Appeals. Judge Parker's discussion of the Darden case is found on pages 15 and 16 of respondent's brief. The respondent complains that in our brief in support of the petition for writ of certiorari we make but one brief reference to the Darden case, that on page 31 of our brief. As we see it, the brief reference thus referred to accurately and correctly distinguishes the Darden case from the pending case. We say that the Darden case "involved a clear question of limitation of liability in express language and not a forfeiture as is provided by the policies here in question". However, if there be any question about the correctness of our statement, we wish to point out wherein the Darden case is distinguishable. The applicable provision of the policy of insurance in that case is as follows:

> "Article VII, Sec. 4. Should the member die or death be caused directly or indirectly from any of the following diseases or causes, either acute or chronic, contracted within two years from date of this certificate, or within two years after reinstatement of membership, from heart disease, liver, bladder, stomach or kidney trouble, * * * the Association will pay one-fifth of the amount otherwise payable under the terms of the membership certificate. If death is caused from surgical operation within said two-year period, the liability shall be one-fifth of the amount otherwise payable". (170 Va. 481)

It is difficult for us to conceive of language that could more definitely and positively limit the liability of an insurance company in certain specified events than the language which was thus used. As a matter of fact, Darden died within two years of the issue of the policy of valvular heart disease. He held a policy wherein the company's liability in such an event was limited to one-fifth of what the beneficiary would otherwise have been entitled to. As we see it, far from overruling *United Security Life Insurance & Trust Co.* v. *Massey*, 159 Va. 832, 164 S. E. 529, 167 S. E. 248, 85 A. L. R. 306, the Court reaffirmed the doctrine of that case in the following language:

> "In the case of *United Security Life Insurance & Trust Co.* v. *Massey*, 159 Va. 832, 164 S. E. 529, 167 S. E. 248, 85 A. L. R. 306, the question was not the amount payable under the terms of the policy, but whether or not the policy was void because of the breach of a covenant subsequent. In that case, there was a valid contract of insurance. Its terms, its provisions and the amount payable were all clearly set out. There was a covenant, however, by the

insured that he would not engage in service on any railway train after the issuance of the policy. In violation of that covenant, he was killed while acting as a brakeman for a railway company. There were no original reservations as to the risk assumed, but there was a provision for the forfeiture of the contract upon the breach of the covenant subsequent. The company did not undertake, during the lifetime of the insured, to cancel the contract for the breach of the covenant. It was there held that the policy was incontestable upon the grounds assigned.

"Mr. Justice Holt, after reviewing numerous authorities, and approving the holding in *Metropolitan Life Insurance Co.* v. *Conway*, 252 N. Y. 449, 169 N. E. 642, said: 'Here the policy is a valid contract of insurance. In its inception no exceptions appear upon its face, and, if defeated, it must be, not because of original reservations, but because of some covenant broken. The latter possibility is one which the statute (section 4228) was designed to meet'.

"The effect of an incontestable clause or statute on an exclusion of the kind in question here was considered in *Metropolitan Life Insurance Co.* v. *Conway*, supra. There the company sought to impose on policies of life insurance issued in New York the following rider:

" 'Death as a result of service, travel or flight in any species of aircraft, except as a fare-paying passenger, is a risk not assumed under this policy; but if the insured shall die as a result, directly or indirectly of such service, travel or flight, the company will pay to the beneficiary the reserve on this policy.'

> "In holding that the foregoing rider was a valid provision, and not in conflict with a statutory incontestable provision, Chief Justice Cardozo said: 'The provision that a policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years is not a mandate as to coverage, a definition of the hazards to be borne by the insurer. It means only this, that within the limits of the coverage, the policy shall stand, unaffected by any defense that it was invalid at its inception or thereafter became invalid by reason of a condition broken. * * * . Cases cited." (170 Va. 483, 484)

Again, as in the *Massey* case, reference was had to *Metropolitan Life Insurance Co.* v. *Conway*, 252 N. Y. 449, 169 N. E. 642, and it will be recalled that in that case Judge Cardozo indicated plainly that where a policy was upon its face incontestable after one year and this was coupled with the further condition that it should be void should the insured die by his own hand, then in such case the incontestable clause prevailed and there could be a recovery, notwithstanding the suicide of the policy holder. It will further be remembered that in that opinion Judge Cardozo said:

> "It is quite another thing to say that the same facts will prevail against a refusal to assume the risk".

And it will be further remembered that this language of Judge Cardozo was quoted with approval in the *Massey* case, as we pointed out on page 21 of our brief.

It is true that in the *Massey* case the opinion by Judge Spratley is susceptible to the construction that the *Massey* case was decided because of the distinction

"made between facts which might have warranted a recision of the contract and those cases involving risks not covered by the contract". An examination of the opinion of the *Massey* case clearly shows that this was only one of the reasons for the decision of the Supreme Court of Appeals of Virginia. It is briefly discussed in the opinion, 159 Va. 832, on pages 853 and 854. That discussion begins with the statement: "The company cannot prevail for another reason". All of the preceding part of the opinion is predicated upon the holding that the language of the policy worked a forfeiture and did not constitute either an exclusion of risk or a limitation of liability. Notwithstanding the charge of the respondent that we have made inaccurate and misleading assertions, we now and here repeat that the language of the policy in the *Massey* case is for all practical purposes identical with the language of the policies in the present case, and we expect to hereinafter demonstrate the truth of this statement.

JUDGE PARKER'S OPINION

The respondent quotes from Judge Parker's opinion on page 6 of his brief as follows:

> "It is perfectly clear, we think, that any language showing that liability of the insurer under the policy shall not extend to death from suicide and that, in such event, the premiums paid on the policy shall be returned, is a sufficient compliance with the requirement of the statute".

We have no quarrel whatsoever with this statement as a principle of general law and are prepared to concede for the sake of argument that it is probably the majority rule. We insist that it is not the rule in Virginia, because

if it had been, the first opinion and decision in the *Massey* case would have remained undisturbed, because in that case there was language used by which the insurer clearly attempted to provide that the policy should not extend to death while engaged in railway service, and the Virginia Court in its second opinion held the provision invalid and not available as a defense because of the incontestable clause. Certainly the Virginia Court was of the opinion that there was some sort of magic in a particular phrase, and so did Judge Cardozo in *Metropolitan Life Insurance Co.* v. *Conway*, supra, as their opinions clearly show, Judge Parker to the contrary notwithstanding. If it be true, as stated by Judge Parker on page 6 of respondent's brief that

> "a provision to the effect that, in case of suicide, a life policy shall be void, is as definite a statement as could possibly be made that the coverage of the policy does not extend to suicide or, what is the same thing, that the liability of the company is so limited as not to cover suicide"

and if it be true that this is the law of Virginia, then the *Massey* case should have gone off upon the theory that there was an exclusion of risk with respect to railway service, because that is precisely what the policy in the Massey case provided with respect to such service. We are not concerned with the holding of *Moore* v. *Bankers' Credit Life Ins. Co.*, 223 Ala. 373, 136 So. 798, referred to by Judge Parker and quoted on page 7 of respondent's brief because, as we see it, the Virginia Court is not in accord with the Alabama rule.

Again, the quotation from Judge Parker's opinion on page 8 of respondent's brief to the effect

> "It is clear, therefore, that the suicide clause, whether it provides that the policy shall be void in case of suicide or that suicide is not a risk covered, is necessarily a limitation on coverage. Its effect is to except death by suicide from the promise to pay the amount of the policy in case of death."

seems to us to be in the teeth of the *Massey* case. If that is the law of Virginia with respect to suicide, it must also be the law where a company, by using such language as is used in the present policies, attempts a limitation on coverage as to railway service. The *Massey* case holds definitely to the contrary.

We cannot agree with the statement made in Judge Parker's opinion and quoted on page 10 of respondent's brief as follows:

> "While language was used indicating that this would be the proper holding (*Massey* case) if breach of condition related to the suicide clause, the mind of the court was not directed to that point and no account was taken of the limitation of coverage necessarily involved in such a clause."

We do not understand how this statement can be made in view of the fact that, as was pointed out on page 16 of our brief, the two opinions of the Court discussed or cited every suicide case cited by the respondent (in its brief in the Circuit Court of Appeals) with the sole exception of *Moore* v. *Bankers' Credit Life Ins. Co.*, supra. We cannot understand this statement in view of the fact that approximately four pages of the first opinion deal with the discussion of suicide cases and that approximately one-half of the second opinion likewise deals with such cases. As we see it, to say that "the mind of the Court was not directed to that point and no account was taken

of the limitation of coverage necessarily involved in such clause" is to accuse the Supreme Court of Appeals of Virginia of crass stupidity.

Further, we take issue with Judge Parker in the statement quoted from his opinion on page 15 of respondent's brief as follows:

> "There can be no distinction in law or in reason between a provision to the effect that upon certain conditions one-fifth only of the face of the policy shall be payable and one to the effect that upon certain conditions the promise of the policy to pay the face amount shall be void and the premiums paid shall be returned".

This Court is quite aware of the fact that innumerable insurance companies write policies wherein the death benefits increase according to the number of years the policy is carried. Is this not a limitation of liability clearly expressed, and is not the provision of the policy in the Darden case, to which Judge Parker was referring, a clear and plain limitation of liability in the event of death from certain causes? There is no forfeiture worked. There is a definite statement that in one event one amount will be paid and in another event a different amount will be paid. This is quite similar to policies which by their terms exclude death while in military service from the coverage of the policy. As we pointed out on pages 20 and 21 of our brief, where the provision is that death while engaged in such service is not a risk assumed, the provision is held valid and available to the company as a defense. On the other hand, where the language used is that the policy shall be void if the insured engages in such service, it has no effect and is not available as a defense.

The respondent says on page 20 of its brief that we apparently miss the point of Judge Parker's reference to *Security Life Ins. Co. of America* v. *Dillard*, 117 Va. 401, 84 S. E. 656, Ann. Cas. 1917D, 1187. It is referring to our comment on pages 30 and 31 of our brief. We reply that the respondent has evidently missed the point that we attempted to make. We were not referring to Judge Parker's citation of the case referred to, but we were referring to that part of his opinion which shows that the Court was refusing to follow what it calls the dictum in the *Massey* case because that so-called dictum is "opposed to what we regard as the sound and reasonable rule arising out of the common law of the state". Our page reference is to the record, page 31. Judge Parker's citation of the case mentioned was on page 25 of the record. We referred to the case because it did hold that there could be no recovery on a life insurance policy in the event of suicide, but we at once attempted to point out that this rule had been abrogated by statute in Virginia; that the Trial Court based its decision not upon the common law of Virginia, but upon Section 4228 of the Code, as construed in the *Massey* case. We repeat now what was said on page 31 of our brief, "If the Circuit Court of Appeals has attempted to decide this case upon what it conceives to be the Common law of Virginia, it has plainly missed the crucial and controlling point which is involved". And yet, as we understand Judge Parker's language which we have quoted from page 31 of the record, that is precisely what the Court did.

We again insist that instead of our missing the point in Judge Parker's opinion, the respondent has entirely missed the point which we attempted to raise. This perhaps because of our inability to clearly express ourselves.

PROVISION FOR THE RETURN OF PREMIUMS

On page 13 of respondent's brief we are charged with making inaccurate and misleading statements in our brief.

It is true that inadvertently we quoted from the *Massey* case in such a way as to indicate that paragraph 9 is from the original opinion rather than the second opinion. Perhaps we should have made it plain that such was not the case. The fact is that paragraph 9 is the first paragraph of the second opinion and the language which we quoted ahead of paragraph 9, both on pages 17 and 19 of our brief, is the concluding paragraph of the first opinion. We were perhaps careless in not distinguishing between the two, but we do not see how that fact affects our argument in any respect. The other inaccuracies and misleading statements pointed out are confined almost exclusively to the fact that we failed to set out the provision of the suicide clause to the effect that "but in such event the company will return any premiums paid". We do set out this language when we quote the suicide clause on page 3 of our brief. We certainly had no purpose of concealing anything from this Honorable Court, but in our view of the case, the language referred to is utterly meaningless and without purpose. If the Court will examine Section 4228 of the Code of Virginia set out on pages 3 and 4 of our petition, it will see that the statute does not require any provision in the policy for the return of the premiums. The language which the statute says should be in the policy is "an express provision * * * limiting the liability of the insurer in the event that the insured shall within two years from the date thereof die by his own act (whether sane or insane)". It is further provided that "such

provision shall be valid but the insurer shall be obligated to return or pay at the least the amount of the premiums paid on account of such policy" but there is no requirement that this provision be written into the policy. It is imposed upon the insurer by law where the defense of suicide within two years is asserted and where the policy has carried such a provision as the statute requires. We suggest in passing that the otherwise able opinion of the District Judge is inaccurate in its apparent assumption that Section 4228 requires a provision for the return of premiums as quoted on page 13 of respondent's brief. We can explain the lapse only upon the theory that "even Homer sometimes nods".

We insist that as it is plain that the provision for the return of premiums does not have to appear as a part of the policy, the alleged distinction which the respondent repeatedly insists upon between the *Massey* case and the present case disappears from the picture. In the event that there had been a defense in the *Massey* case because of suicide, the fact that the policy did not provide for the return of the premiums would not have relieved the company of the obligation to return same. In the present case, if the language providing for the return of the premiums had not appeared in the policy, nevertheless there would have been a definite statutory duty and obligation upon the part of the company to refund the premiums if the defense of suicide was made. The point is not whether the present policies contain something which the statute does not require, but whether they contain "an express provision limiting the liability of the insurer in the event" of suicide, which the statute does require.

OTHER VIRGINIA CASES

We see nothing in *Ayres* v. *Harleysville Mutual Casualty Co.*, 172 Va. 383, 2 S. E. (2d) 303, that is in any wise

applicable to the case at bar. As a matter of fact, while that case held as stated by the respondent that the Court will not "make a contract for the parties which they did not make themselves and never intended to make", it held that in that case the language of the policy was ambiguous and construed it against the insurer.

Nor do we have any quarrel with the doctrine of *Harmon* v. *Farm Bureau Mutual Automobile Ins Co.*, 172 Va. 61, 200 S. E. 616, or *Kennard* v. *Travelers Protective Association*, 157 Va. 153, 159, 160 S. E. 38, 40, because in both of those cases the Court had under consideration provisions of policies which were clear and free from any doubt and so held. In this case this Court is considering two unquestionably conflicting clauses of a life insurance policy, to-wit: the suicide clause and the incontestable clause. The Virginia Court has held in the *Massey* case that under a substantially similar state of facts, (certainly so far as the language of the policies is concerned,) the incontestable clause prevails.

POINTS B, C, D, AND E

In view of the fact that respondent's entire argument on points B, C, D and E are based upon its effort to contend that the expressions from the *Massey* case upon which we rely are mere dictum without even persuasive value, and in view of the fact that we have attempted to refute this position, we see no occasion for any reply to the argument made with respect to the points mentioned.

CONCLUSION

We again insist that this case is one calling for the exercise by this Court of its supervisory powers, by grant-

ing a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

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